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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 454 F.2d 871. The opinion of the United States District Court for the District of Puerto Rico is not reported.

II.

QUESTION PRESENTED

The question presented may be stated somewhat more simply than it is expressed by the Petitioner (Pan Am). It is:

> Did the court below determine correctly that Pan Am's action here was barred by the defense of *res judicata?*

This question involves no federal issue of substance and, accordingly, the Petition should be denied.

III.

STATEMENT OF THE CASE

In 1958, the Commonwealth of Puerto Rico condemned certain land owned by Pan Am for the benefit of the Puerto Rico Industrial Development Company (PRIDCO). Just compensation was paid to and accepted by Pan Am. In 1959, PRIDCO sold the land to Sears, Roebuck and Co. (Sears). In 1961, Sears sold the land to Sears, Roebuck de Puerto Rico, Inc. (Sears PR), its wholly-owned subsidiary, and a typical Sears store was erected on the land.

In 1964, long after the condemnation, Pan Am sued in the Superior Court of Puerto Rico to set aside the condemnation. Its complaint[1] covered a broad field. It joined the Commonwealth, PRIDCO, Sears and Sears PR as defendants. It asserted: (*a*) that the condemnation was void because not for a public purpose; (*b*) that PRIDCO had the duty to reconvey the property to Pan Am when it was not used for industrial purposes; (*c*) that Pan Am still owned the land; and (*d*) that Pan Am was entitled to rent since acquisition by PRIDCO. It sought a declaration that Pan Am owned the land and should recover such rental. The Superior Court, after three hearings,[2] denied all relief and dismissed the complaint.[3] Pan Am did not appeal.

Pan Am, undaunted by this decision, filed the present action in the District Court in 1970. Relying on diversity jurisdiction, Pan Am did not join the Commonwealth or PRIDCO as defendants; it joined only Sears and Sears PR. It asserted that the condemnation was void because it was never notified of the proposed sale to Sears and given an asserted right to repurchase the property.[4] It sought to recover title to the property and damages.[5]

The District Court held that the Commonwealth and PRIDCO were indispensable parties and that the complaint must be dismissed.[6] It held, in addition, that Pan Am had no cause of action against Sears or Sears PR but *only* against PRIDCO and the Commonwealth.[7] And on recon-

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[1] Appendix to Brief (1st Cir.) 38
[2] Petition 14a
[3] Petition 21a
[4] Petition 24a
[5] Petition 25a
[6] Petition 9a
[7] Petition 10a; see Appendix hereto

sideration, it held that Pan Am's action was barred by *res judicata.*[8]

The First Circuit affirmed, basing its decision on *res judicata.*[9] It noted that Pan Am's contention that it had asserted a cause of action under the Civil Rights Act was frivolous. It said:

> "No substantial violation of federal constitutional rights is asserted."[10]

IV.

ARGUMENT

A government has the right to condemn property for public use. *Jones* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937); *Georgia* v. *Chattanooga,* 264 U.S. 472 (1924). A government's legislative determination of what is a public use will not be set aside unless manifestly arbitrary and unreasonable. *United States* v. *Tennessee Valley Authority,* 327 U.S. 546 (1946); *Old Dominion Land Co.* v. *United States,* 269 U.S. 49 (1925); *Block* v. *Hirsh,* 256 U.S. 135 (1921).

Condemnation requires notice, hearing and payment of just compensation. *United States* v. *Miller,* 317 U.S. 369 (1943). Pan Am does not allege that it did not receive due notice, that it was not accorded a proper hearing or that it was not paid just compensation. No citizen has a constitutional right to reacquire his property after it has been condemned by a government and he has received just compensation. Where such a constitutional right has been asserted, the existence of the right has been summarily rejected.

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[8] Appendix hereto

[9] Petition 6a

[10] Petition 1a

United States v. *Three Parcels of Land,* 224 F. Supp. 873 (D. Alas. 1963). Few states confer such a right in their condemnation statutes. This disposes of any due process argument.

No claim is made that Puerto Rico permitted some landowners to repurchase condemned property but denied that right to Pan Am. Thus no denial of the equal protection of the laws is in fact asserted.

The application of *res judicata* raises no substantial federal question when its application neither denies nor restricts a federally protected right. Because the right to repurchase is not a federally protected right, whether or not Pan Am had the right to repurchase is a matter solely of Puerto Rican law. Whether or not the right to repurchase had been previously adjudicated is, accordingly, only a matter of Puerto Rican law.

The decision below is not a departure from the accepted and usual course of judicial proceedings. Puerto Rico recognizes the doctrine of *res judicata* and applies it substantially in the same fashion that it would be applied in a common law jurisdiction. *Perez* v. *Bauza,* 83 P.R. 213 (1961); *Cruz* v. *Ortiz,* 82 P.R. 802 (1961); *Melendez* v. *Cividanes,* 63 P.R. 4 (1944). On this basis, not only did the court below follow the accepted and usual course, but its decision was right.

Furthermore, the decision below stands also on a valid alternative ground based purely on Puerto Rican law. That ground is the holding by the District Court that, if Pan Am has any cause of action, it is against Puerto Rico and PRIDCO and it has no cause of action against Sears or Sears PR.[11] That determination raises no federal question.

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[11] Petition 10a; Appendix hereto

No assertion is made in the Petition that the decision appealed from conflicts with that of another court of appeals or that it determined an important question of Puerto Rican law in conflict with any applicable Puerto Rican decision. This case raises no important question of federal law; in fact, as the Court of Appeals held, no substantial violation of federal constitutional rights was even asserted below. It is too late to assert such a violation in this Court.

V.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated July 6, 1972.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ORDER ON REHEARING

Civil No. 243-70

PAN AMERICAN MATCH INC.
PLAINTIFF

vs.

SEARS ROEBUCK AND CO.,
SEARS ROEBUCK DE PUERTO RICO, INC..
DEFENDANTS

ORDER

On February 8, 1971 this Court entered its "Order, Memorandum Opinion and Judgment" dismissing the complaint herein for the reasons that the Commonwealth of Puerto Rico and the Puerto Rico Industrial Development Company ("PRIDCO") are indispensable parties to this action and because the Puerto Rican statute upon which the complaint is grounded does not afford a cause of action against the defendants.

On February 17, 1971 plaintiff filed a "Motion for Reconsideration and/or Re-hearing" and a "Motion for Additional Findings of Fact and Amendments." The Court granted a hearing on these motions and the same were fully argued by counsel on March 5, 1971. Moreover, although plaintiff's motions have not raised any issues which had not previously been argued and briefed, the Court reexamined all relevant documents of record and the memoranda of law filed by both parties. After this thorough reexamination, the Court reaffirms the views expressed in its memorandum opinion of February 8, 1971, and for the reasons briefly stated herein, plaintiff's motions are denied.

In its motion for reconsideration, plaintiff requests that if the complaint be denied, such denial be granted without prejudice. As set forth in this Court's memorandum opinion, the Court finds that no cause of action against defendants flows out of the statute relied upon by the plaintiff. Moreover, plaintiff's claim was litigated before the Commonwealth courts and plaintiff elected not to seek a writ of review in the Commonwealth Supreme Court. Under the circumstances, the Court reaffirms its prior ruling of dismissal with prejudice.

Plaintiff seeks also additional findings of fact. A review of this Court's prior order shows that all facts relevant to this Court's decision are set forth therein. These facts appear uncontroverted. No other findings appear necessary.

For the foregoing reasons, plaintiff's motions of February 17, 1971 are denied and the order and judgment of February 8, 1971 dismissing the complaint with prejudice and without award of costs, is reaffirmed.

Let this Order be notified.

San Juan, Puerto Rico, March 19, 1971.

/s/ HIRAM R. CANCIO
HIRAM R. CANCIO
Chief Judge, U.S. District Court